

State of California

Public Utilities Commission
Los Angeles

MEMORANDUM

Date: April 6, 2015

To: The Commission
(Meeting of April 9, 2015)

From: Helen M. Mickiewicz, Asst. General Counsel
Daren Gilbert, Program Manager, Rail Transit Safety Branch
Patrick S. Berdge, Principal Counsel

Subject: Federal Transit Administration's State Safety Oversight Notice of Proposed Rulemaking, 49 C.F.R. Part 674, Docket No. FTA-2015-0003¹

RECOMMENDATION: The CPUC should file comments in response to the *Notice of Proposed Rulemaking (NPRM)* released by the Federal Transit Administration (FTA) on February 27, 2015. *Public comments must be filed by April 28, 2015.*

On July 6, 2012 (effective Oct. 1, 2012) Congress enacted 49 U.S.C. § 5329 which provided that those states receiving federal funds for public transportation fixed rail guideway systems shall assume responsibility for overseeing the safety of these systems. (49 U.S.C. § 5329(e).) The State Safety Oversight *NPRM* proposes regulations carrying out Congress' enabling legislation under 49 U.S.C. § 5329.

In the *NPRM*, the FTA seeks comment on numerous issues concerning its intention to transfer safety responsibility for public transit fixed-guideway systems to the states and the FTA and away from the Rail Transit Agencies (RTAs). The states must establish State Safety Oversight Agencies (SSOAs) capable of providing such safety oversight over any existing or planned transit systems within three years from the effective date of the new rule. This Rulemaking applies only to systems that receive Federal funding under the FTA grant funding programs of 49 U.S.C. Chapter 53.² California, as well as other states, has a number of smaller trolley, funicular, and automated people mover systems that do not receive federal funding, which should be covered under the SSO safety program and funded by the SSOA grant program, to the extent those systems are regulated by the State, as they are in California.

¹ 80 Fed. Reg. 11002 (Feb. 27, 2015).

² California, as well as some other states, have a number of smaller trolley, funicular, and automated people mover systems that do not receive federal funding, which the *NPRM* does not propose to cover.

California has a long-standing rail transit/fixed guideway safety program that pre-dates the current Federal SSOA program.³ The CPUC was designated as the SSOA in 1992 by then Governor Pete Wilson and is presently capable of performing most of the safety oversight functions contemplated by the Rulemaking. While some administrative burdens will be increased under the Rulemaking, it will provide federal funds to cover 80% of the cost of the safety oversight duties to the SSOA. The FTA has announced that the CPUC would receive funds of approximately \$2.8 million per year.⁴ The regulation that is the subject of this rulemaking will replace 49 CFR Part 659 requirements with a new 49 CFR Part 674, which FTA believes is responsive to Congressional mandates.

The Rail Transit Safety Branch of the CPUC's Safety and Enforcement Division is responsible for the CPUC's fixed guideway public transportation safety oversight program, which includes oversight of 14 fixed guideway public transportation systems⁵ in California. Eight systems receive some level of Federal finding, but the remaining six smaller systems receive no federal funds.

Moving Ahead for Progress in the 21st Century Act (MAP-21, July 6, 2012), MAP-21, required FTA to develop certification requirements for SSOAs and provides for grants to eligible States to develop or carry out rail fixed guideway public transportation safety oversight programs. FTA developed the certification requirements based on the Congressional direction provided by MAP-21 and on October 1, 2013, the FTA certified the CPUC SSOA program as one of only two in the nation whose existing program met all certification requirements. Subsequently the CPUC passed Resolution ST-169 which authorized staff to apply for the available grant funding for our SSOA program.

SED has reviewed the FTA *NPRM* and recommends formal comments addressing the issues as outlined below be developed for submittal by the CPUC in this docket. Subsequent to this FTA rulemaking, several other rulemaking dockets will be necessary to enact rules addressing all Congressional mandates. Changes to CPUC General Order (GO) 164-D will likely be necessary at the conclusion of the FTA rulemaking processes to update the GO requirements to match the Federal regulations.

BACKGROUND: Title 49 U.S.C. § 5330 created SSOAs in 1994. Title 49 C.F.R. Parts 659 et seq. were enacted in 1995. Both the statute and the regulations placed the primary burden of safety on the RTAs. This was considered by some to be an unfunded mandate. The CPUC

³ Pub. Util. Code § 99152 enacted in 1978, provides the CPUC with safety oversight of public transit fixed-rail guideways.

⁴ FTA Table 13, FY 2014 Section 5329(e) State Safety Oversight Program Apportionments.

⁵ The 14 fixed guideway public transportation systems in California are the Americana on Brand Trolley, Angel's Flight Railway Company, Bay Area Rapid Transit District, Getty Museum Automated People Mover, The Grove Trolley, Los Angeles County Metropolitan Transportation Authority, North County Transit District's Sprinter, Port of Los Angeles Red Car Line, Sacramento International Airport Automated People Mover, Santa Clara Valley Transportation Authority, San Diego Trolley Inc., San Francisco Municipal Transportation Agency, San Francisco International Airport AirTrain Automated People Mover, and Sacramento Regional Transit District.

continued to pass safety regulations affecting RTAs throughout this period under its rail safety authority over transit districts in the Public Utilities Code.⁶ 49 C.F.R. Parts 659 et seq. required each RTA to have in place a system safety plan, a system security plan, a hazard management plan, accident notification to the SSOA plans, accident investigation plans, annual internal reviews of those plans by the RTAs, and triennial reviews of the RTAs plans and operations by the SSOA. The penalty for non-compliance was a 5% reduction in federal funds for transit projects in the state.

DISCUSSION AND RECOMMENDATIONS: Staff recommends the CPUC file comments on the following specific issues regarding the FTA's proposed new rules.

FTA's Proposed Rules

I. Definition of "Incident" under Sections 674.7 and 674.35(b)

Proposed Section 674.7 in the *NPRM* would create and define a new classification of events called "incidents", which would require the SSOA to investigate and prepare written reports, over and above the activity required under the current definition of "accident." Specifically, proposed Section 647.35(b) would require that an SSOA "issue a written report on its investigation of an Accident or Incident in accordance with established reporting requirements." An investigation is defined under Section 674.7 as "means the process of determining the causal and contributing factors of an accident, incident, or hazard, for the purpose of preventing recurrence and mitigating risk." Section 674.7 defines an "incident" as an:

...Event that exceeds the definition of an Occurrence, but does not meet the requirements of an Accident. *Examples include, but are not limited to: A near miss or close call, a railyard derailment, non-serious injuries, a violation of a safety standard, or equipment or property damage less than \$ 25,000 that affects transit operations [emphasis added].*

The FTA's proposed definition of an incident requiring a written investigation is too broad. Under the two proposed regulations, the SSOA must issue a formal written accident for a skinned knee or damage to an easily replaceable \$2.00 light rail vehicle part. SED considers this requirement to be impractical and unrealistic adding unnecessary minutia to more critical safety tasks. Instead, SED recommends that the CPUC urge the FTA to afford the SSOA discretion in investigating and preparing reports on "incidents," and in particular, limiting investigation of "incidents" to those that may have a significant or important bearing on the safety of the RTA. SED recommends a process that would require RTAs to report all "incidents", but allow the SSOA to develop criteria for determining which "incidents" should be further investigated and a written report prepared.

Proposed section 674.7 also would define "accident" to include specific criteria set forth in a number of subsections, among which is the term "serious injury." The FTA proposes to require

⁶ Pub. Util. Code §§ 29047, 30646, 99152, 100168, General Order (G.O.) 88-B, 143-B, 164-D, and 175.

both RTAs and SSOAs to follow up on individuals who sustain injury in an “event” to determine whether the nature of the injury(ies) would meet the “accident”, “incident”, or “occurrence” criteria. SED fears this proposal, if adopted, would require SSOA staff who are not medically trained to render judgments about, for example, whether hemorrhaging is “severe,” a term left undefined in the proposed rules. Clearer criteria, such as whether the injured individual was transported from the event site by ambulance, would result in more consistent application of the proposed rule.

II. Certification of the State Oversight Program under Section 674.17

This proposed section indicates the FTA will make grant funds available to the states to fund up to 80% of the state’s SSOA program, and outlines the basis for the formula used to allocate funding between the states. CPUC Resolution ST-169 authorized SED to seek such grant funds, and staff currently is working through the FTA grant process.

III. Certification of the State Oversight Program under Section 674.19

This proposed section indicates the FTA would make grant funds available to the states to fund up to 80% of the state’s SSOA program related to transit system FTA funds, and outlines the basis for the formula used to allocate funding between the states.

IV. Confidentiality of information under Section 674.23

The *NPRM* provides that “a State may withhold an investigation report that may have been prepared or adopted by the oversight agency from being admitted as evidence or used in a civil action for damages. . . .” SED assumes that the FRA is not suggesting that accident reports be kept confidential since Section 674.39(a)(3) specifically provides that “publicly available” reports by the SSOA must describe “the causal factors of accidents or incidents identified through investigation...”.

In the past, the FTA has suggested (see the FTA’s April 29, 2005 Rail Fixed Guideway Systems; State Safety Oversight Final Rule, Docket No. FTA—2004—17196, 49 C.F.R. § 659), that SSOA’s make safety information confidential. “FTA recommends that each state identify measures to be taken to ensure that safety and security sensitive information is not publicly disclosed.” (70 Fed. Reg. 22562 (April 29, 2005, at 22566.)) A policy proposed by FTA in 2005, preventing public disclosure of accident investigations and safety information, is prohibited under California’s Constitution and statutes requiring transparency in government.

The CPUC cannot withhold its investigative reports or safety information. Any policy, such as that proposed by the FTA in 2005 preventing public disclosure of accident investigations and safety information, is prohibited under California’s Constitution and statutes requiring transparency in government. (See Cal Const, Art. I § 3(b)(1) & (2).) California’s Public Records Act also “...finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state” (Cal. Gov. Code § 6250). Except for preliminary or draft reports, accident investigation reports and safety information is not exempt from public disclosure under Cal. Gov. Code § 6254. However, the

CPUC has not interpreted these provisions to apply to information or reports concerning public transit security which the CPUC treats as confidential.

Nevertheless, California's statutes do comply with the direction of Section 674.23 that:

State, State Safety Oversight Agency, or a rail fixed guideway public transportation system may withhold an investigation report prepared or adopted in accordance with the Federal regulations for State Safety Oversight *from being admitted as evidence or used in a civil action for damages resulting from a matter mentioned in the report* [emphasis added].

California Public Utilities Code § 315 provides:

...Neither the order or recommendation of the commission or any accident report filed with the commission shall be admitted as evidence in any action for damages based on or arising out of such loss of life, or injury to person or property.

Finally, the *NPRM* opines that RTAs:

...often face litigation arising from accidents, and that the release of accident investigation reports can compromise both the defense of litigation and the abilities of rail transit systems to obtain comprehensive, confidential analyses of accidents. See, the preamble to the 1995 rule at 60 FR 67034, 67042 (Dec. 27, 1995).

SED notes that while this is the contention of many RTAs, some legislative bodies and many courts suggest that accident litigation serves the public interest in shedding additional light on RTA and SSO safety oversight practices serving to reduce the overall number of serious accidents. Additionally, the damages assessed against unsafe practices of the RTAs or inadequate oversight by SSOs create important and necessary incentives for both agencies to improve their safety practices and culture.

V. Role of the State Safety Oversight Agency under Section 674.25

The FTA proposes to delegate the Secretary's responsibility for "any hazard or risk that threatens the safety of a rail fixed guideway public transportation system within its oversight" to the SSOA. (Section 674.29(c).)

SED considers that this delegation of responsibility is ill-advised. The RTA should continue to be charged with the primary responsibility for determining the existence of hazards, investigating them, and ensuring that such hazards are mitigated. The RTAs have more experience with the operation of their systems and a greater opportunity to discover hazards in the operation of their systems. Only after the RTA has brought the hazard to the attention of the SSOA should the SSOA review the RTA's determination of a hazard and the RTA's mitigation measures for it. Of course, either the FTA or the SSOA may independently determine the existence of a hazard and

order proper mitigations but the primary responsibility for identifying hazards should continue to rest with the RTA.

VI. Role of the State Safety Oversight Agency under Sections 674.25(e) & Accidents under Section 674.35

As with hazards, Section 674.25(e) would place primary responsibility of accident investigations on the SSOA. SED contends primary responsibility for accident investigations should continue to rest with the RTA. SED does not dispute the National Transportation Safety Board's (NTSB's) finding of "a lack of adequate oversight both by the rail transit systems' State Safety Oversight Agencies, and FTA." (80 Fed. Reg. at 11005.) The NTSB also determined that "[d]eficiencies in oversight—of the kind being addressed by this rulemaking—were specifically identified as a contributing factor for five of the 19 major [rail transit] accidents" reviewed by the NTSB. As a result, the NTSB has made improving the operational safety of the rail transit industry one of its Top Ten Most Wanted Items in 2014. (80 Fed. Reg. at 11015.)

However, making the SSOA responsible for investigation of *all* accidents⁷ would dilute its resources and abilities by forcing the SSOA to formally investigate and draft accident investigation reports for *every* accident—even the smallest and those with little or no probability of serious consequences. Those accidents with little effect on the safety of the overall public guideway system should be left to the RTAs themselves investigate allowing the SSOA to review the facts of the accident and the RTA's findings of the causes and contributing factors without a formal investigation and report.

Finally, SED supports the FTA's direction regarding accident investigations that the RTA may also investigate an accident in addition to the SSOA's independent investigation. (80 Fed. Reg. 11011.) SED contends that RTA's should be encouraged to conduct accident investigations so long as they do not interfere with or prejudice the SSOA's separate and independent investigation that might create a conflict of interest in analyzing an accident.

VII. Corrective Action Plans under Section 674.37

Proposed Section 674.37(a) would require the SSOA to review and approve prior to implementation any corrective action plan developed by the RTA. SED presently performs this function under state statutes and CPUC General Orders and supports the regulation. Generally, SED directs the RTA to prepare a draft of the corrective action plan after discussions concerning the content and purpose of the plan. The language of this regulation seems to allow that procedure although it is somewhat confused by language in Section 674.37 providing "an SSOA must issue a written report...and set[] forth a corrective action plan." A written report by the SSOA is not necessary for every corrective action plan so long as it is reviewed, approved, and adopted in writing by the SSOA.

⁷ "A State Safety Oversight Agency (SSOA) must conduct an independent investigation of any Accident or Incident that is reported to the SSOA and the Administrator in accordance with § 674.33(a)." (Section 674.35.)

The regulation also directs the RTA to “periodically report its progress in carrying out the corrective action plan, and the SSOA may monitor the Rail Transit Agency's progress through unannounced, on-site inspections, or any other means the SSOA deems necessary or appropriate.” (*Ibid.*) SED does not disagree with regular reporting on the performance of the corrective action plan and its results. However, if the FTA has a specific period of reporting in mind, it would be helpful to provide the timeframe it believes is appropriate.

VIII. Role of the State Safety Oversight Agency under Section 674.39

Among other duties, proposed Section 674.39(a) would require that each SSOA submit an annual report on or before March 15th of each year to the FTA, the Governor of the State, and the Board of Directors of each RTA setting forth:

1. SSOA oversight program with an indication of any changes to the program standard during the preceding twelve months;
2. Evidence that each of its employees and contractors is in compliance with the requirements of the Public Transportation Safety Certification Training Program;
3. A publicly available report that summarizes its oversight activities for the preceding twelve months, describes the causal factors of accidents or incidents identified through investigation, and identifies the status of corrective actions, changes to Transit Agency Safety Plans, and the level of effort by the SSOA in carrying out its oversight activities;
4. A summary of the triennial audits completed during the preceding twelve months, and the Transit Agencies' progress in carrying out corrective action plans arising from triennial audits conducted in accordance with § 674.31;
5. Evidence that the SSOA has reviewed and approved any changes to the Transit Agency Safety Plans during the preceding twelve months; and
6. A certification that the SSOA is in compliance with the requirements of this part.
7. At least once a year, the SSOA reports the status of the safety of each rail fixed guideway public transportation system to the Governor, the FTA, and the board of directors, or equivalent entity, of the rail fixed guideway public transportation system.

SED generally supports proposed Sections 674.13 and 674.39 but is concerned that, as presently written, proposed Sections 674.13(a)(7) and 674.39(a)(7) place too great a burden on SSOAs. SED considers an annual report for each RTA to be unnecessary unless a particular RTA has had a serious injury or an accident that the SSOA believes requires special attention, a problem with a corrective action plan, or other problems that should be brought to the attention of the FTA. An annual report for each RTA is likely to result in repetitive language that will not assist the

FTA, the Governor of the State, or the Board of Directors of the RTA in reviewing the functional safety of the RTA. SED recommends that reports to the RTA Boards of Directors should be limited to the Triennial Audit Report, which could be used as the basis for providing the comprehensive evaluation the original FTA language contemplated, and for providing meaningful reports to the agency Boards.

IX. MISCELLANEOUS

SED respectfully requests that the FTA expand the period for submitting comments in future NPRMs to a minimum of 90 days. SED found it difficult to meet, discuss, and carefully review this *NPRM* within the allotted two months since it is subject to state and CPUC procedures for submitting comments in federal proceedings.

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